

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**C.F., Appellant**

**and**

**U.S. POSTAL SERVICE, COSTA MESA MAIN  
POST OFFICE, Costa Mesa, CA, Employer**

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**Docket No. 20-0222  
Issued: December 21, 2020**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 6, 2019 appellant filed a timely appeal from a May 10, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant has met her burden of proof to establish a low back condition causally related to the accepted factors of her federal employment.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that OWCP received additional evidence following the May 10, 2019 decision. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **FACTUAL HISTORY**

On June 30, 2016 appellant, then a 36-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a low back injury due to factors of her federal employment, which included repetitive bending and lifting. She noted that she first became aware of her condition and first realized its relation to factors of her federal employment on March 3, 2016. On the reverse side of the claim form the employing establishment noted that appellant had not stopped work. In a March 3, 2016 narrative statement, appellant explained that her employment duties included casing mail, bending, picking up tubs of mail, and standing for two to two and a half hours, depending on the mail volume. She noted that her lower back began to hurt sometime in January of the prior year, and that she was able to manage her work, if she used her shoulders, but her condition had worsened over the last few months.

In a July 12, 2016 development letter, OWCP informed appellant that additional evidence was required in support of her claim. It advised her of the type of factual and medical evidence necessary. OWCP afforded appellant 30 days to submit the requested evidence.

In a letter dated July 12, 2016, the employing establishment controverted the claim. O.A., a supervisor, noted that appellant failed to report her illness on March 3 2016 and never had mentioned her back complaints or asked for help with her delivery route.

A March 30, 2016 magnetic resonance imaging (MRI) scan read by Dr. Shams Sheikh, a Board-certified diagnostic radiologist, revealed a congenital bony fusion of L1-2, scoliosis of the upper lumbar spine, disc osteophyte complex with only minor neural foraminal stenosis, L2-3 far lateral disc bulge at the right exiting L2 nerve, L4-5 moderate neural foraminal stenosis, on the right, and borderline hepatomegaly.

In an April 20, 2016 report, Dr. Edward Mittleman, a family medicine specialist, noted appellant's history of injury and medical treatment. He described her employment duties in detail and he noted how appellant physically completed her employment duties. Dr. Mittleman noted appellant's physical examination findings and diagnosed acceleration of lumbar spondylosis and lumbar disc protrusions, based on review of her MRI scan. He also noted that appellant had no low back problems prior to her work for the employing establishment. Dr. Mittleman explained that the physical work factors appellant engaged in, such as heavy lifting and forceful movements, and bending and twisting, contributed to low back disorders. He referred to several scientific studies and opined that appellant's activities at work accelerated the degenerative changes in her lumbar spine. Dr. Mittleman explained that medical studies have shown that the combination of activities appellant performed at work requiring flexion, rotation, and compression led to disc pathology. He also explained that, in addition to the other factors appellant performed at work, carrying a satchel weighing up to 35 pounds placed significant compressive force on the axial skeletal system of the spine. Dr. Mittleman concluded that it was "medically reasonable to infer a direct causal relationship between the activities that [appellant] performs on a daily basis and the development of the pathology (spondylosis and disc protrusions) noted in her MRI [scan]."

By decision dated September 22, 2016, OWCP denied appellant's claim. It explained that the medical evidence did not support that the claimed medical condition was caused by established work-related events and did not address her preexisting spinal condition.

In an October 7, 2016 report, Dr. James T. Tran, a Board-certified neurosurgeon, noted that OWCP did not review his July 8, 2016 report, which addressed causal relation. He indicated that he would "resubmit" the report.

In his July 8, 2016 report, Dr. Tran noted appellant's history of injury and medical treatment. He explained that she noted that, approximately two years prior, she began to notice periodic low back pain, saw her physician, and was advised that her x-rays were normal. Dr. Tran further noted that appellant continued to work and began to notice more severe low back pain a few months prior to her current evaluation. He indicated that she complained of aching, pinching, stabbing, and cramping pain in her low back that made it difficult to complete her job duties and sleep at night. Dr. Tran diagnosed sciatica, spinal stenosis of the lumbar region with neurogenic claudication, lumbar disc degeneration, connective tissue and disc stenosis of intervertebral foramina of lumbar region, and osseous stenosis of neural canal of lumbar region. He explained that appellant worked as a letter carrier for 11 years, casing and delivering mail, lifting 25 to 35 pounds of mail and magazine containers, twisted and turned her low back to lift and case mail, loaded mail into hampers, pushed hampers weighing up to 300 to 400 pounds, and carried a mail satchel weighing up to 35 pounds. Dr. Tran opined that appellant's L1-2, L2-3, L3-4, L4-5 stenosis from hypertrophy of ligamentum flavum and stimulated growth of bone in facet joints resulted from her work activities.

On April 24, 2017 appellant requested reconsideration.

By decision dated July 6, 2017, OWCP denied modification. It found that the medical evidence did not address appellant's preexisting spinal condition.

On October 25, 2017 appellant requested reconsideration.

OWCP received a January 31, 2013 MRI scan of the lumbar spine read by Dr. Gary E. Geil, a radiologist. Dr. Geil diagnosed congenital fusion of L1 and L2 vertebral bodies with associated dysplastic facet joints at L1-2 and a disc bulge at T12-L1.

In an October 18, 2017 report, Dr. Mittleman noted that he had reviewed the January 31, 2013 MRI scan of appellant's lumbar spine and that no facet hypertrophy was present. However appellant's March 30, 2016 MRI scan showed facet hypertrophy at T2-L1, L2-3, L4-5, and L5-S1, which was consistent with acceleration of spondylosis. Dr. Mittleman again described appellant's employment duties in detail. He referred to several medical publications and opined that the activities appellant performed on a daily basis were consistent with acceleration of the lumbar physiologic processes from her occupational activities. Dr. Mittleman requested that appellant's claim be accepted for acceleration of lumbar spondylosis.

By decision dated January 12, 2018, OWCP denied modification of the July 6, 2017 decision.

On March 16, 2018 appellant requested reconsideration.

In a March 8, 2018 report, Dr. Basimah Khulusi, Board-certified in physical medicine and rehabilitation, noted that the January 31, 2013 and March 30, 2016 MRI scan reports showed that appellant's degeneration of the lumbar disc had accelerated between those dates. She explained that, although the report of Dr. Mittleman was insufficiently rationalized, it was uncontroverted and sufficient to warrant additional development of the medical evidence.

By decision dated May 31, 2018, OWCP denied appellant's request for reconsideration. It found that the evidence submitted was cumulative and substantially similar to evidence or documentation already contained in the case record and previously considered. OWCP determined that the reconsideration request neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant a review of the May 31, 2018 decision.

On January 11, 2019 appellant's then representative requested reconsideration. She argued that the March 8, 2018 report of Dr. Khulusi should be considered new evidence, not previously considered. Dr. Khulusi also noted that additional development was warranted because the medical evidence was uncontroverted, despite not being sufficiently rationalized to establish causal relationship.

On February 13, 2019 OWCP referred appellant to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, for a second opinion examination to determine causal relationship between the claimed conditions and accepted factors of appellant's federal employment.

In an April 23, 2019 report, Dr. Einbund noted appellant's history of injury and medical treatment. He also noted the employment duties appellant performed. Dr. Einbund noted that the January 31, 2013 and March 30, 2016 MRI scans of appellant's lumbar spine revealed preexisting conditions which included a congenital bony fusion at L1-L2, a posterior disc bulge at the L2 nerve and T12-L1, mild degenerative disc disease at L5-S1, and scoliosis of the upper lumbar spine. He explained that the January 31, 2013 and March 30, 2016 MRI scans were abnormal, revealed a congenital fusion at L1 and L2, and were "considered within the natural progression of her underlying degenerative lumbar spine condition." Dr. Einbund diagnosed congenital fusion at L1-L2 level, mild scoliosis of the lumbar spine, and lumbar degenerative disc disease. He opined that the diagnoses were not causally related to appellant's work activities and explained that appellant had a congenital irregularity at the L1-L2 level and multilevel degeneration, which was secondary to body habitus and natural aging. Dr. Einbund further opined that her condition "remained chronic secondary to her underlying lumbar spine condition with no specific change associated with work activities."

By decision dated May 10, 2019, OWCP denied modification of the January 12, 2018 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time

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<sup>3</sup> *Supra* note 1.

limitation of FECA,<sup>4</sup> that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>6</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.<sup>7</sup>

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.<sup>8</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.<sup>9</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>10</sup>

In a case in which a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.<sup>11</sup>

Section 8123(a) of FECA provides, in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the

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<sup>4</sup> See *R.S.*, Docket No. 19-1939 (issued May 6, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *Y.G.*, Docket No. 20-0688 (issued November 13, 2020); *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *R.C.*, 59 ECAB 427 (2008).

<sup>6</sup> *C.H.*, Docket No. 19-1781 (issued November 13, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>7</sup> *T.D.*, Docket No. 20-0921 (issued November 12, 2020); *M.S.*, Docket No. 18-1554 (issued February 8, 2019); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>8</sup> *J.F.*, Docket No. 18-0492 (issued January 16, 2020); *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>9</sup> *L.D.*, *id.*; see also *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>10</sup> *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013). See *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

Secretary shall appoint a third physician who shall make an examination.”<sup>12</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>13</sup>

### **ANALYSIS**

The Board finds that the case is not in posture for decision.

In his April 20, 2016 report, Dr. Mittleman provided a detailed description of appellant’s employment duties and he explained how she physically completed her employment duties. He noted appellant’s physical examination findings and diagnosed acceleration of lumbar spondylosis and lumbar disc protrusions, based on appellant’s MRI scan. Dr. Mittleman explained that the physical work factors appellant engaged in, such as heavy lifting and forceful movements, bending and twisting, accelerated the degenerative changes in her lumbar spine. He opined that medical studies had shown that the combination of activities appellant performed at work requiring flexion, rotation, and compression led to disc pathology. Dr. Mittleman also explained that, in addition to the other factors appellant performed at work, carrying a satchel weighing up to 35 pounds placed significant compressive force on the axial skeletal system of the spine. He concluded that it was medically reasonable to infer a direct causal relationship between the employment activities appellant performed on a daily basis and her diagnosed back conditions. In his October 18, 2017 report, Dr. Mittleman noted that he had reviewed the January 31, 2013 MRI scan of appellant’s lumbar spine, that no facet hypertrophy was present, but that appellant’s March 30, 2016 MRI scan showed facet hypertrophy at T2-L1, L2-3, L4-5, and L5-S1, which was consistent with acceleration of spondylosis. The Board finds that Dr. Mittleman did address appellant’s preexisting lumbar condition and concluded that her employment activities caused an acceleration of her diagnosed condition.

The Board therefore finds that Dr. Mittleman’s reports are in conflict with the report of Dr. Einbund, OWCP’s second opinion physician.

In his April 23, 2019 report, Dr. Einbund reviewed appellant’s medical records, history of injury and treatment, and her employment duties. He conducted a physical examination and reviewed appellant’s January 31, 2013 and March 30, 2016 MRI scans. Dr. Einbund diagnosed congenital fusion at the L1-L2 level, mild scoliosis of the lumbar spine, and lumbar degenerative disc disease. He found that the MRI scans were “considered within the natural progression of her underlying degenerative lumbar spine condition.” Dr. Einbund opined that appellant’s condition “remained chronic secondary to her underlying lumbar spine condition with no specific change associated with work activities.”

As noted above, if there is a disagreement between an employee’s physician and an OWCP referral physician, OWCP will appoint a referee physician or impartial medical specialist who shall

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<sup>12</sup> 5 U.S.C. § 8123(a).

<sup>13</sup> S.S., Docket No. 19-1658 (issued November 12, 2020); C.W., Docket No. 18-1536 (issued June 24, 2019).

make an examination.<sup>14</sup> The Board finds that there is a conflict in the medical opinions between Dr. Mittleman and Dr. Einbund regarding whether appellant's accepted employment factors, accelerated appellant's preexisting lumbar spondylosis.

The Board therefore finds that the case must be remanded to OWCP for referral of appellant to an impartial medical examiner for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).<sup>15</sup> After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

### **CONCLUSION**

The Board finds that the case is not in posture for decision

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 10, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 21, 2020  
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>14</sup> *Supra* note 12.

<sup>15</sup> *S.S.*, *supra* note 13; *S.M.*, Docket No. 19-0397 (issued August 7, 2019).